STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0360

State of Minnesota,
Appellant,

vs.

Leonel Isidor Carrillo,
Respondent.

Filed January 20, 2009
Reversed and remanded
Hudson, Judge
Concurring in part, dissenting in part,
Harten, Judge*

Dakota County District Court
File No. KX-07-2505

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, Minnesota 55101; and

James C. Backstrom, Dakota County Attorney, Helen R. Brosnahan, Assistant County Attorney, Dakota County Judicial Center, 1560 Highway 55, Hastings, Minnesota 55033 (for appellant)

Lawrence Hammerling, Chief Appellate Public Defender, Andrea G.M. Barts, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, Minnesota 55104 (for respondent)

Considered and decided by Hudson, Presiding Judge; Larkin, Judge; and Harten, Judge.*

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* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

HUDSON, Judge

Appellant State of Minnesota challenges the sentencing of respondent Leonel Carillo. Because the record indicates that the sentencing judge impermissibly relied on respondent's immigration status in sentencing him, we reverse and remand for resentencing.

FACTS

About nine years ago, respondent immigrated illegally into the United States and came to Minnesota. In 2003, he purchased identity papers with a name, birthdate, and social security number; he used these papers to obtain employment. Respondent was unaware that the papers pertained to a real person, J.L.G. In 2007, respondent was arrested at his place of employment after police learned that he was working under J.L.G.'s name.

By complaint dated August 2, 2007, respondent was charged with aggravated forgery pursuant to Minn. Stat. § 609.25, subd. 1(1) (2006), and forgery pursuant to Minn. Stat. § 609.63, subd. 1(5) (2006), both felonies. On December 10, 2007, respondent pleaded not guilty. A jury trial was scheduled for April 2008 before a judge to be determined the day before trial in accordance with established procedures. The state asserts that, on February 11, 2008, following "procedural irregularities" and for "an unspecified reason," respondent's file was transferred to the judge who imposed the challenged sentences without notice to the state. Respondent, however, contends that the state was notified of the scheduling change.

On February 21, 2008, respondent pleaded guilty to count I, aggravated forgery, and count II was dismissed. The presumptive sentence was a year and a day. Contrary to the state's recommendation, the district court ordered a downward departure to 365 days, execution stayed, and respondent was placed on probation for two years. Respondent was also required to make restitution to J.L.G. This sentence reduced respondent's felony conviction to a gross misdemeanor by application of Minn. Stat. § 609.13, subd. 1 (2006), and constitutes a downward durational departure.

The state challenges the downward departure, asserting that the district court abused its discretion when it relied on respondent's immigration status and potential deportation consequences to support its departure from the Minnesota Sentencing Guidelines. The state seeks reversal of the district court's order and a remand for sentencing. The state also requests that, upon any remand, this court direct the district court administrator to randomly assign this case to another judge.

This appeal follows.

D E C I S I O N

Sentencing departure

This court reviews a sentencing court's departure from the guidelines for an abuse of discretion. *State v. Geller*, 665 N.W.2d 514, 516 (Minn. 2003). "A court abuses its discretion when it acts . . . in contravention of the law." *State v. Mix*, 646 N.W.2d 247, 250 (Minn. App. 2002), *review denied* (Minn. Aug. 20, 2002). "Possible deportation because of immigration status is not a proper consideration in criminal sentencing." *State v. Mendoza*, 638 N.W.2d 480, 481 (Minn. App. 2002), *review denied* (Minn. Apr. 16,

2002); *see also Alanis v. State*, 583 N.W.2d 573, 578–79 (Minn. 1998) (holding that possible deportation is only a collateral, not a direct, consequence of a guilty plea and is not a ground for plea withdrawal); *Barragan v. State*, 583 N.W.2d 571, 572–73 (Minn. 1998) (holding that deportation, by itself, is not a manifest injustice that requires withdrawal of a guilty plea).[1]

When it sentenced respondent, the district court said:

> We're supposed to be the land of opportunity and yet we make it very difficult for those who would come to be law abiding persons even if they're not quite citizens yet, and *it sickens me that we have these circumstances existing at this time for those who would come here to work*, to raise a family, to pay taxes which assists our government.
>
> What you have done, Mr. Carillo, has impacted another individual, but you didn't take that from the individual with the intent of harming him. You purchased paperwork. I think there's a significant difference . . . between an intentional harm and an attempt to make a living and support a family.
>
> . . . .
>
> I don't know what kind of consequences may come from our INS with respect to your staying here in the United States . . . . I have no control over that. If they decide that you have to leave, you'll lose a family.
>
> I can't fault you for wanting to be here and to support your family. This is far different from most of the felony offenses that come before me, but it does affect other people.

[1] *But see State v. Kebaso*, 713 N.W.2d 317, 324 n.7 (Minn. 2006) (declining to address the *Mendoza* holding that "possible deportation because of immigration status is not a proper consideration in criminal sentencing" and leaving its resolution "for another day.").

(Emphasis added.) The district court imposed the 365-day sentence, noting that respondent's felony conviction "becomes then a gross misdemeanor sentence and conviction which after a successful period of probation will become a misdemeanor conviction." *See* Minn. Stat. § 609.13, subd. 1.

A district court has discretion to depart from the presumptive guidelines sentence. *State v. Gassler*, 505 N.W.2d 62, 69 (Minn. 1993). The question presented to the sentencing court when considering a durational departure is whether the defendant's conduct in the offense of conviction was significantly more or less serious than that typically involved in the commission of the crime in question. *State v. Cox*, 343 N.W.2d 641, 643 (Minn. 1984) (cited in *State v. Misquadace*, 644 N.W.2d 65, 69 (Minn. 2002)). The Minnesota Sentencing Guidelines include a nonexclusive list of mitigating factors that may be used as reasons for departure. One of the factors is other substantial grounds that "tend to excuse or mitigate the offender's culpability, although not amounting to a defense." Minn. Sent. Guidelines, II.D.2.a.(5); *State v. Esparza*, 367 N.W.2d 619, 621 (Minn. App. 1985).

But a district court abuses its discretion if it acts in contravention of the law. *Mix*, 646 N.W.2d at 250. Here, the district court references several arguably permissible bases for departure. Specifically, the district court noted that respondent did not intend to harm the victim and that because respondent was attempting to support his family, appellant's defense was "far different from most of the felony offenses that come before me . . . ." But the district court also made repeated references to respondent's immigration status and plainly sentenced respondent, in light of that status, for a gross misdemeanor rather

than a felony—in direct contravention of the *Mendoza* holding that "[p]ossible deportation because of immigration status is not a proper consideration in criminal sentencing." *Mendoza*, 638 N.W.2d at 481.

Admittedly, the district court's decision to express its views on the hardships of illegal immigrants does not necessarily mean that it relied on those views in sentencing respondent, and the mere expression of a viewpoint does not mandate reversal of a sentencing departure. *See Williams v. State*, 361 N.W.2d 840, 844 (Minn. 1985) (holding prospectively that, if reasons given for departure are improper or inadequate but sufficient evidence supports departure, departure will be affirmed); *State v. Bauerly*, 520 N.W.2d 760, 763 (Minn. App. 1994) (when departure from felony to misdemeanor sentence is adequately supported, reviewing court need not consider state's assertion that sentencing court impermissibly relied on its own disagreement with the sentencing guidelines in departing), *review denied* (Minn. Oct. 27, 1994). But, in our view, the district court went beyond giving improper or inadequate reasons; the transcript supports the inference that at least one reason (immigration status) for the sentencing departure was contrary to law and an abuse of discretion. *See Mix*, 646 N.W.2d at 250. We therefore reverse respondent's sentence and remand for sentencing without consideration of his immigration status or potential deportation consequences.[2]

Resentencing

The state also questions the district court's impartiality and asks that this court, on remand, order that the matter be assigned to a different district court judge. The state's

[2] We do not address the propriety of the sentence imposed.

position is based on three factors: (1) alleged "procedural irregularities" in scheduling; (2) the district court's failure to comply with the sentencing guidelines; and (3) the district court's comments with respect to respondent's immigration status that "it sickens me that we have these circumstances existing at this time."

Procedural irregularities

The record indicates that, after respondent pleaded not guilty in December 2007, the matter was scheduled for an April 2008 jury trial before an unidentified judge. Then, on February 11, 2008, the district court's "activity summary" contains the following entry: "PER PHONE CALL FROM [THE SENTENCING JUDGE'S] CLERK [THE MATTER WAS] SET FOR PLEA HEARING 2/21/08 @ 9AM; NOTICES SENT . . . LAK." In its brief here on appeal, the state argues that it did not receive prior notice of the rescheduled plea hearing and implicitly suggests that the matter was "steered" to this particular sentencing judge. At oral argument, appellant's attorney suggested that the "notices sent" phrase in the activity summary entry reflects that notice was sent to the state *after* the plea hearing. Appellant's attorney did not acknowledge that she ever received the notice. In contrast, in her brief and at oral argument, respondent's attorney continued to suggest that we read the entry "notices sent" to mean that the state was notified prior to the rescheduled plea hearing date.

On this meager record, we cannot say that there were sufficient "procedural irregularities" to support the state's claim of judicial partiality in sentencing. First, the parties' briefs do not substantively address the issue of judicial partiality. The principle focus of the state's brief is the district court's improper use of appellant's immigration

status as a ground for departure. The judicial partiality claim was a secondary issue, accompanied by little analysis. Only in the last few lines of the state's brief, in a section entitled "Remedy on Remand," does the state minimally flesh out its claim that the district court engaged in or countenanced the alleged procedural irregularities. Respondent, likewise, devotes a few sentences in response, contending that the state *did* receive prior notice, as indicated by the "notices sent" phrase in the activity summary entry. There are no affidavits from either party, and nothing else in the record supports the state's claim. We are left, then, with the district court's activity summary, the interpretation of which the parties dispute. But it is not our role to resolve factual disputes. *In re Welfare of M.D.O.*, 462 N.W.2d 370, 374–75 (Minn. 1990).

Second, we note that the state did not object or otherwise raise its concerns regarding potential judicial partiality to the district court, despite the fact that the state had many well-established avenues through which it could have proceeded. *See generally, State v. Burrell*, 743 N.W.2d 596, 599–601 (Minn. 2008). Specifically, the state could have: (1) objected to the plea hearing before it started and asked for a continuance based on lack of notice; (2) requested a continuance of the sentencing portion of the hearing once it learned there was a request for departure; or (3) filed a motion for reconsideration, including a motion to remove the sentencing judge pursuant to Minn. R. Crim. P. 26.03, subd. 13. Had the state availed itself of any of these options, this court would have a more fully developed record on which to address any claims of judicial partiality.

This court routinely—and properly—denies consideration to claims raised on appeal where those claims have not been properly preserved and developed by objection to the district court. *See, e.g.*, *State v. Byron*, 683 N.W.2d 317, 323 (Minn. App. 2004) (holding that "[i]f a defendant fails to preserve an objection prior to entry of a guilty plea, we may find that the issue is waived and decline to consider it"), *review denied* (Minn. Sept. 29, 2004); *State v. Tovar*, 605 N.W.2d 717, 726 (Minn. 2000) (stating that, in general, only "clear and specific objections raised before the district court" will preserve the issue of admissibility of a particular piece of evidence for appeal). The principle rationale underlying those decisions—fostering meaningful appellate review—applies here with equal force. *See Paine v. Crane*, 112 Minn. 439, 441, 128 N.W. 574, 575 (1910) ("The object of an objection to the admission of evidence is to enable the [district court] to rule intelligently thereon, and, if it is not sufficiently specific for such purpose . . . the correctness of the ruling cannot be reviewed [by an appellate] court"); *see also Adesiji v. State*, 384 N.W.2d 908, 912 (Minn. App. 1986) (holding that an issue is not preserved for appeal where the record is inadequate to permit meaningful review), *review denied* (Minn. June 13, 1986).

We acknowledge that the scheduling of this matter raises serious questions regarding judicial impartiality and maintenance of the public's trust and confidence in the judiciary. Thus, we do not take the state's claim lightly. But by the same token, there may be a legitimate explanation for the manner in which the plea hearing was rescheduled. In that regard, we note that neither the sentencing judge, his law clerk, nor district court administration has been given an opportunity to address the state's claims.

The state's allegations are serious. But that is precisely why this court should not act on those allegations in the absence of a more fully developed record. Accordingly, on this record, we cannot conclude that there was judicial partiality in sentencing based on "procedural irregularities."[3]

Failure to comply with the sentencing guidelines

The state claims that the integrity of the sentencing procedure was impugned by a departure from the guidelines sentence based on the district court's reliance on respondent's immigration status. We disagree. The state's claim must be tempered by the supreme court's recent observation in *State v. Kebaso*, that it would leave "for another day" resolution of whether possible deportation because of immigration status is a proper consideration in criminal sentencing. 713 N.W.2d 317, 324, n.7 (Minn. 2006). Nevertheless, the present state of the law and the greater weight of authority clearly indicates that possible deportation because of immigration status is not a proper consideration in sentencing. *Mendoza*, 638 N.W.2d at 481. Accordingly, the district court's reliance on respondent's immigration status and potential deportation consequences was improper and an abuse of discretion.

But that fact does not necessarily evidence judicial partiality. It is not unheard of for district courts to rely on impermissible factors to support sentencing departures. Nor is it uncommon for district courts to express their personal opinions on the matters before

[3] We also note that, as evidenced in part by the cases cited to us by appellant, we have primarily ordered the reassignment of cases on remand when the district court judge has been improperly involved in the plea negotiation process. *See, e.g., State v. Anyanwu*, 681 N.W.2d 411, 415 (Minn. App. 2004); *State v. Moe*, 479 N.W.2d 427, 430 (Minn. App. 1992), *review denied* (Minn. Feb. 10, 1992).

them in lieu of, or in addition to, other factors. And we have held that doing so does not mandate reversal where sufficient evidence in the record supports departure. *Williams*, 361 N.W.2d at 844; *Bauerly*, 520 N.W.2d at 763. Here, there was other evidence in the record, cited by the district court, that arguably supported the district court's departure, including the district court's determination that respondent purchased the documents to secure employment and did not intend to harm the victim—making the offense less serious in the district court's mind. Moreover, based on the sentencing worksheet and the Dakota County probation report filed with the district court, respondent had no prior criminal history. Accordingly, we decline the state's invitation to hold that the departure in and of itself is evidence of judicial partiality.

Comments on respondent's immigration status

The state directs us to the district court's comments at sentencing that "[w]e're supposed to be the land of opportunity and yet we make it very difficult for those who would come to be law abiding persons even if they're not quite citizens yet, and it sickens me that we have these circumstances existing at this time." The district court's comments were clearly improper, and we caution the district courts to be ever vigilant not to create even the appearance of impropriety. But again, on this record, we cannot conclude that the district court's comments evidence judicial partiality.

Our conclusion is informed by *Burrell*, wherein the supreme court held that the state failed to meet its burden to show cause to remove a district court judge. 743 N.W.2d at 597. In *Burrell*, the state attempted to remove the district court judge, arguing that the judge twice stated in a pretrial conference that the state could not prove its case

and should therefore dismiss it. *Id.* at 599. These comments, contended the state, raised a reasonable question as to the judge's impartiality. *Id.* at 602. But the judge had informed the state that it would listen to the state's case and that it had not prejudged the guilt or innocence of the defendant. *Id.* at 600. Nevertheless, the state argued that the judge should remove himself because, among other things, he had drawn conclusions about the merits of the case. *Id.* The district court denied the motion for removal. *Id.*

On appeal, both this court and the supreme court affirmed, with the supreme court noting that while "[j]udges . . . should be sensitive to the 'appearance of impropriety,' . . . a judge who feels able to preside fairly over the proceedings should not be required to step down upon allegations of a party which themselves may be unfair or which simply indicate dissatisfaction with the possible outcome of the litigation." *Id.* at 602 (quoting *McClelland v. McClelland*, 359 N.W.2d 7, 11 (Minn. 1984)).

While we see little distinction in the district court's alleged statements in *Burrell* from those of the district court here in terms of potential impact on the merits or disposition of the case, of more significance for our purposes is the procedural history and the nature of the record before the appellate courts. In *Burrell*, the state: (1) filed an affidavit and objected to the judge remaining on the case at the pretrial conference, resulting in a ruling by the judge setting forth his reasons for denying the request for removal; and (2) filed an objection with the chief district court judge and moved to remove the judge for cause, resulting in an order denying the motion and setting forth the chief judge's rationale. 743 N.W.2d at 599–600. On review, the appellate courts had a detailed record affording meaningful appellate review. That is not the case here.

For all of the reasons stated above, we reverse and remand for sentencing in accordance with the Minnesota Sentencing Guidelines and this opinion. We deny the state's request to direct that the matter be assigned to a different district court judge. If the matter is again assigned to the sentencing judge, the state is free to bring a motion requesting that the sentencing judge recuse himself.

Reversed and remanded.

HARTEN, Judge (concurring in part, dissenting in part)

While I concur with the majority in its decision to reverse and remand respondent's sentence, I dissent from its unaccountable denial of the state's appropriate request that this case be assigned to a different district court judge for resentencing. In my view, the sentencing judge should be removed from the case.

The majority asserts that the record does not support a conclusion that the sentencing judge demonstrated partiality. A review of the record refutes this assertion.

First, the judge opened the sentencing hearing by saying, "[L]et's consider the matter of the State of Minnesota against . . . Leonel Isidor Carillo, and Leonel is personally present before the Court here this morning." The judge repeatedly referred to respondent as "Leonel" and addressed him by that name.[4] "[A] judge shall be impersonal in addressing the lawyers, litigants, and other officers of the court." Minn. R. Gen. Pract. 2.02(c). The use of first names is not an impersonal form of address. *Cf. The Random House Dictionary of the English Language* 724 (2d ed. 1987) (defining "first name" as a verb: "to address (someone) by his or her first name, esp. as a sign of informality or familiarity").

Second, the judge's comment that "we make it very difficult for those who would come to be law abiding persons even if they're not quite citizens yet, and it sickens me that we have these circumstances existing at this time for those who would come here to

[4] *See, e.g.*, "Leonel, is that what you want to do today?" "I'm going to ask . . . Leonel . . . if that's an accurate statement"; "Leonel, can I have you raise your right hand"; "Did you understand that to be the case, Leonel?" "All right. Go ahead, Mr. Miera, you can ask Leonel."

work, to raise a family, to pay taxes which assists our government", indicated explicitly his aversion to the difficulties faced those in respondent's position and implicitly his aversion to adding to those difficulties in sentencing respondent.[5]

Third, the judge listened to respondent's counsel argue that respondent should receive a misdemeanor sentence (a sentencing departure) rather than a stayed felony sentence because, with a felony sentence, the Immigration and Naturalization Service (INS) "would consider [respondent's crime] a felony[.]" The judge then imposed a misdemeanor sentence and said he did not know and could not control "what kind of consequences may come from our INS with respect to [respondent's] staying here in the United States." But in fact, by sentencing an illegal immigrant's felony as a misdemeanor, the judge was attempting to exercise some control over immigration status, a matter entirely outside the judge's authority. Judges are not permitted to exercise jurisdiction in matters outside their authority. *See Park Elm Homeowner's Assoc. v. Mooney*, 398 N.W.2d 643, 647 (Minn. App. 1987) (reversing part of judgment "[b]ecause the trial court acted completely outside its authority . . . [and] we hold that its judgment was tantamount to one rendered despite a lack of subject matter jurisdiction"). The

[5] The fact that the sentencing judge may have considered his views to be "in the interest of justice" did not confer a right to express those views. *See State v. Moe*, 479 N.W.2d 427, 430 (Minn. App. 1992) (reversing and remanding for reassignment to different judge even though trial court judge regarded his impermissible participation in the proceedings as being in the interest of justice), *review denied* (Minn. 10 Feb. 1992).

sentencing judge did not and could not adjudicate respondent's immigration status, but his attempt to influence that status denoted partiality for respondent.

Fourth, the judge said, "I can't fault you for wanting to be here and to support your family." Respondent was not before the judge because he wanted to support his family; he was there to be sentenced for a felony to which he had pled guilty. Thus, the sentencing judge's language itself, as he addressed and referred to respondent, set forth his own sympathetic views on the problems of illegal immigrants. The judge's comments on respondent's immigration status and the possible effect of his sentence on that status provided evidence of his partiality for respondent. At no time did the judge refer to respondent's obvious continuing violation of the Immigration and Nationality Act, § 275, 8 U.S.C. § 1325, a federal misdemeanor that provides up to six months imprisonment for illegal entry. Nor did the judge ascertain when respondent demonstrated remorse during either his nine years of illegal residence or his three years of illegal use of a false identity.

The majority asserts that the sentencing departure itself does not denote partiality because other factors exist to support the departure and the judge may have relied on those factors. But the judge's supposed reliance on factors supporting the departure is far less significant than his undoubted reliance on one unauthorized factor: respondent's immigration status. A judge has discretion to rely or not rely on mitigating factors; a judge has no discretion to rely on a factor this court has held is "not a proper

consideration in sentencing." *State v. Mendoza*, 638 N.W.2d 480, 481 (Minn. App. 2002), *review denied* (Minn. 16 April 2002).[6]

Finally, the majority concludes that there were insufficient "procedural irregularities" to support a claim of partiality. The district court's activity summary indicates that respondent pled not guilty in December 2007 and the matter was scheduled for jury trial in April 2008. But in February 2008, an activity entry indicates that "PER PHONE CALL FROM [THE SENTENCING JUDGE'S] CLERK [THE MATTER WAS] SET FOR PLEA HEARING 2/21/08 @ 9AM . . . ." At oral argument, counsel for the state indicated that judges' law clerks are not normally involved in scheduling procedures and that the state had not received prior notice of the hearing; counsel also said she did not know why these procedural irregularities occurred.[7] In context, these "procedural irregularities" present at least an appearance of impropriety. "To maintain public trust and confidence in the judiciary, judges should avoid the appearance of impropriety and should act to assure that parties have no reason to think their case is not being fairly judged." *State v. Pederson*, 649 N.W.2d 161, 164-65 (Minn. 2002). The state had reason to think its case was not being fairly judged.

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[6] The majority claims the sentencing judge may have relied on a footnote in *State v. Kebaso*, 713 N.W.2d 317, 324 n.3 (Minn. 2006), in which the supreme court said it would leave resolution of this holding for another day. But the supreme court had and declined the opportunity to review the *Mendoza* holding, and its denial of the petition for review makes this court's opinion binding on a district court. *See Sefkow v. Sefkow*, 427 N.W.2d 203, 213 (Minn. 1988).

[7] Respondent's counsel on appeal was not the counsel who had represented him at the hearing; at oral argument, his counsel was unable to provide any explanation for the scheduling irregularity.

The majority claims that the state erred by not seeking a continuance or moving for reconsideration and that its failure to do either deprived this court of an adequate record. But the majority does not identify what essential items are absent from the record. All perceptions constituting an appearance of impropriety are faithfully recorded in the case file and hearing transcript.[8] In the context of this case, a sentence in a district court document indicating that a phone call from a particular judge's law clerk resulted in scheduling a plea hearing before that judge, who had no prior involvement in the case, together with other factors indicated, cannot avoid drawing the scrutiny of a responsible appellate judiciary. *See* Minn. R. Civ. App. P. 103.04 (this court may review any matter as the interest of justice may require).

The irregular scheduling of the plea hearing before the sentencing judge, the sentencing judge's language, the reliance on an illegal factor in sentencing, and the exercise of ordinary common sense collectively compel this court to grant the state's request for an order remanding the matter to a different district court judge. I therefore dissent from the majority's impractical, leaden footed, and unfair denial of that request.

[8] The majority's insistence upon an "adequate record" intimates a possible misunderstanding of the concept of appearance of impropriety. "The test for the appearance of impropriety is whether a person aware of the facts might reasonably entertain a doubt that the judge would be able to act with integrity, impartiality, and competence." Minn. Code Jud. Conduct, canon 2A 1995 cmt. I would define appearance of impropriety as a perception, however momentary, that tends to compromise the object perceived in the eye of the beholder. The majority inappropriately demands conclusive evidence of the compromise itself.